Picus v. Wal-Mart Stores, Inc. et al Doc. 40

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARGARET PICUS, an individual; on behalf of herself, and on behalf of all others similarly situated, Plaintiffs, vs. WAL-MART STORES, INC; MENU FOODS INC.; DEL MONTE CORPORATION; SUNSHINE MILLS, INC.; CHEMNUTRA INC.; and DOES 1 through 100, Inclusive, Defendants.	Case No. 2:07-CV-00682- PMP-LRL **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEL MONTE's MOTION TO STAY PROCEEDINGS** Magistrate: Hon. Lawrence R. Leavitt JUDGE: Hon. Philip M. Pro

Plaintiff Margaret Picus hereby opposes the motion by Defendant Del Monte to stay proceedings [Doc. 38] as follows:

I. INTRODUCTION

Del Monte's "emergency" motion for a stay of all proceedings is inappropriate for several reasons. First, the question of whether the MDL will transfer this case will be decided on or about

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September 27, 2007. Thus, by about the time this motion is fully briefed and considered by the Court, the Judicial Panel will have decided whether this action will be transferred to the MDL. Second, Del Monte fails to inform this Court that the transfer of this action was opposed by both Plaintiff and several of the Defendants in this action, and that no party has advocated for the transfer of this action to the MDL. The reason is simple, this case is about whether the products manufactured, labeled and distributed by Defendants can be designated as "Made in the USA." This case has nothing to do with adulteration or products liability, which is the subject of the Pet Foods MDL. As a result, there should be no real expectation that this case will actually be transferred in light of the factual dissimilarities and the absence of any support for a transfer.

Importantly, there is no good cause for this "emergency" motion. Currently, there is no discovery pending, thus, Del Monte's attempt to secure a stay of discovery is entirely unwarranted. Even if discovery was propounded today, any response to this discovery would not be due before the MDL rules on the transfer of this action. As a result, Del Monte's claim that absent a stay it will be subjected to duplicative discovery is specious and has no basis in fact. Moreover, any discovery in this action would not be duplicative because of the complete difference between this action concerning the fraudulent "Made in the USA" representations and the product liability issues in the MDL.

Finally, Defendants' argue that the pending motion to dismiss justifies a stay of discovery because "the Plaintiff will be unable to state a claim for relief." (Motion at p.8). This argument, however, is demonstrably without merit as Judge Huff of the United States District Court for the Southern District of California has already overruled this argument in the exact same type of case. *Kennedy v. Natural Balance*, 2007 U.S. Dist Lexis 57766 (S.D. Cal. August 8, 2007). A true and correct copy of this recent decision is attached hereto as Exhibit #1. Therefore, there can be no real argument that Plaintiff's complaint, which is the same as in *Kennedy*, states a claim for relief and Defendants' motion to dismiss is without merit.

In this case, Defendants' motion to dismiss is fully briefed and can be decided by the Court immediately after the MDL vacates the transfer of this action.[1] Thus, the Court can appropriately

[1] If the MDL orders the transfer of this action on September 27, 2007, this issue becomes moot.

schedule a hearing date on a convenient day after September 27, 2007 to rule on the motions to dismiss, instead of delaying the progress of this case. As a result, there is simply no reason to issue a stay of all proceedings because of the MDL and no basis to stay the proceedings simply because a Defendant has filed a Rule 12(b)(6) motion. Therefore, Plaintiff respectfully submit that Defendants' motion to stay be denied.

II. DEL MONTE'S MOTION MISSTATES FACTS

Respectfully, Del Monte's motion does not present the facts regarding this case accurately to this Court. First, the transfer of the *Picus* action to the MDL was opposed by Plaintiff and by Defendants. There is no party that has supported the transfer of the *Picus* action. The reason for this unusual agreement between Plaintiff and the Defendants is because parties agreed that the *Picus* action is wholly unrelated to the MDL of the pet food products liability litigation. The *Picus* action is not about adulteration but rather is about the fraudulent and unlawful labeling of Defendants' pet food products as "Made in the USA." This claim is entirely distinct from the product liability claims in the MDL asserting that contaminated food caused injury. As a result, Plaintiff and Defendants Wal-Mart Stores, Sunshine Mills and Menu Foods all requested that the MDL vacate the transfer order.

Second, the MDL Judicial Panel has scheduled the date of September 27, 2007 to determine whether the *Picus* action will be transferred to the Pet Food Products Liability Litigation MDL (No. 1850). (Attached hereto as *Exhibit #1* is a true and correct copy of the Judicial Panel Order and Letter concerning the hearing on the *Picus* trasnsfer. Thus, the MDL ruling will occur soon.

Third, no discovery has been served by Plaintiffs or Defendants. As a result, there is no discovery that could or will occur before the transfer ruling by the MDL Judicial Panel.

III. DEL MONTE'S MOTION FAILS TO INFORM THIS COURT THAT THESE SAME ALLEGATIONS WERE AFFIRMED BY JUDGE HUFF IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

With respect to Del Monte's request for a stay based upon the pending motion to dismiss, Del Monte's argument is untenable for several reasons. First, Del Monte's motion raises factual issues concerning the scope of the recall. Plaintiff's opposition explained why the Court cannot take judicial notice of the facts relied upon by Del Monte. Second, all of the cases cited by Del Monte are distinguishable as this case involves a straightforward motion to dismiss based upon Rule 12(b)(6), and not a motion based upon a lack of jurisdiction or standing.[2] Finally, and most importantly, Del Monte's motion fails to establish why this Court should be "convinced that the Plaintiff will be unable to state a claim for relief." Del Monte fails to even inform this Court of the decision by the United States District Court which upheld these same "Made in the USA" claims and found that these same "allegations are sufficient at this stage."

In the United States District Court for the Southern District of California, the Honorable Marilyn Huff issued a decision on August 8, 2007 denying Natural Balance's motion to dismiss based upon nearly identical grounds as the motions now pending before this Court. *Kennedy v. Natural Balance*, 2007 U.S. Dist Lexis 57766 (S.D. Cal. August 8, 2007). A true and correct copy of this decision is attached hereto as Exhibit #1. This decision was filed on August 8, 2007 and was therefore available to Del Monte at the time of its motion, but Del Monte failed to cite this decision which relates directly to the argument that Plaintiff Picus cannot state a claim for relief in this case. In this decision, Judge Huff addressed the same allegations and held as follows:

> Defendants contend that the rice protein identified in the complaint as coming from China is a raw ingredient that was not "made and/or manufactured" within the meaning of § 17533.7. **Looking at the allegations in the complaint, however, Plaintiff has sufficiently alleged this claim on this ground. The complaint sufficiently alleges that components of the pet food were "made and/or manufactured" outside of the United States.** According to the complaint, one of the foreign components of the pet food was a "manufactured rice protein ingredient." (Compl. P 7.) Additionally, Plaintiff alleges that components of the pet foods were entirely or substantially made, manufactured, or produced outside of the United States. (Id. PP 9-10.) Although Defendants dispute the underlying facts and characterize the rice protein product as simply a "raw ingredient," the Court must construe all allegations in the light most favorable to Plaintiff. **Therefore, Defendants' factual disputes do not provide a ground upon which to dismiss Plaintiff's claim.**

Kennedy, *supra*, 2007 U.S. Dist Lexis 57766 at *11-12 (emphasis added).

As Judge Huff correctly ruled, the Defendants' arguments regarding whether a product was proper designated as "Made in the USA" is a factual dispute which cannot be decided through a Rule 12(b)(6) motion. The result should be no different here. In light of this decision, Del Monte's argument that Plaintiff could not state a claim for relief is untenable.

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[2] Each of the cases cited by Del Monte involved a jurisdictional argument or a legal bar to the claim. Here, Del Monte's motion argues factual issues concerning "ingredient" versus "part" and the scope of the recall. In fact, the motions to dismiss involve the argument that the allegations are not sufficiently particular and/or are vague, which do not meet the standard set forth in Del Monte's citations.

IV. THERE IS NO GOOD CAUSE FOR THE "EMERGENCY" MOTION

Because there is no discovery pending and the MDL motion will be decided in a few weeks, there is no good cause for Del Monte's request for a stay. Indeed, Del Monte's "emergency" motion is much ado about nothing and serves only to burden this Court with needless law and motion practice. Notably, no other Defendant has moved for a stay. Because both the MDL motion and the motions to dismiss can be decided forthwith, and there is no discovery pending, there is no good cause to stay these proceedings.

V. CONCLUSION

Because there has been no discovery served and the question of whether this case will be transferred to the MDL will be decided shortly, there is no need for a stay. Assuming this case is not transferred, there is no "strong showing" for a stay of discovery because of the motions to dismiss because (1) these motions are fully briefed and can be decided immediately after the MDL ruling, (2) these motions involve disputed factual issues, and (3) Plaintiff's allegations have already been sustained by a United States District Court in the Ninth Circuit. As a result, the motion for a stay should respectfully be denied.

Dated: September 5, 2007

BLUMENTHAL & NORDREHAUG

By: /s/ Norman B. Blumenthal

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CERTIFICATE OF SERVICE

I, am, at all relevant times, was a citizen of the United States and a resident of the County of San Diego and am employed by the attorney of record in this action located at 2255 Calle Clara, La Jolla, CA 92037. I hereby certify that the following document(s):

(1) **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEL MONTE's MOTION TO STAY PROCEEDINGS**

has been sent via U.S Mail and Electronically to the attorneys for the Defendants at the following address(es):

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 5, 2007 at San Diego, California.

By: /s/ Norman B. Blumenthal
Norman B. Blumenthal

EXHIBIT #1

LEXSEE 2007 U.S. DIST. LEXIS 57766

ROBERT ADAM KENNEDY, an individual, on behalf of himself, and on behalf of all persons similarly situated, Plaintiff, vs. NATURAL BALANCE PET FOODS, INC., a California corporation; WILBUR-ELLIS COMPANY, a California corporation; and DOES 2 through 100, inclusive, Defendants.

CASE NO. 07-CV-1082 H (RBB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

2007 U.S. Dist. LEXIS 57766

August 7, 2007, Decided
August 8, 2007, Filed

COUNSEL: [*1] For Robert Adam Kennedy, an individual, on behalf of himself, and on behalf of all persons similarily situated, Plaintiff: Norman B Blumenthal, LEAD ATTORNEY, Blumenthal and Nordrehaug, La Jolla, CA.

For Natural Balance Pet Foods Inc, a California corporation, Defendant: Steven E Formaker, Rutter Hobbs & Davidoff Incorporated, Los Angeles, CA.

For Wilbur-Ellis Company, a California corporation, Defendant: Chad R Fuller, LEAD ATTORNEY, Heller Ehrman, San Diego, CA.

JUDGES: MARILYN L. HUFF, District Judge.

OPINION BY: MARILYN L. HUFF

OPINION

ORDER: (1) GRANTING IN PART AND DENYING IN PART NATURAL BALANCE'S MOTION TO DISMISS; (2) GRANTING IN PART AND DENYING IN PART WILBUR-ELLIS' MOTION TO DISMISS

Plaintiff, Robert Adam Kennedy, initially filed suit in state court on May 2, 2007. On June 13, 2007, Defendant Wilbur-Ellis Company removed the case to this Court. (Doc. No. 1.) On July 2, 2007, Defendant Natural Balance Pet Foods, Inc. filed a motion to dismiss. (Doc. Nos. 7-8.) Also on July 2, 2007, Defendant Wilbur-Ellis filed a motion to dismiss. (Doc. No. 10.) Additionally, Wilbur-Ellis filed a notice of joinder in Natural Balance's motion on July 10, 2007. (Doc. No. 11.)

Plaintiff filed a response in opposition to Natural **[*2]** Balance's motion on July 23, 2007. (Doc. No. 12.) Natural Balance filed a reply in support of its motion on July 30, 2007. (Doc. No. 15.) Plaintiff filed a response in opposition to Wilbur-Ellis' motion on July 23, 2007. (Doc. No. 13.) Wilbur-Ellis filed a reply in support of its motion on July 30, 2007. (Doc. No. 14.)

For the reasons stated below, the Court **GRANTS in part and DENIES in part** Natural Balance's motion to dismiss and **GRANTS in part and DENIES in part** Wilbur-Ellis' motion to dismiss. The Plaintiff grants the motions without prejudice, and Plaintiff shall file any amended complaint no later than August 27, 2007.

Background

According to the complaint, Defendants engaged in a scheme through which several varieties of Natural Balance pet food were sold to consumers with the label "Made in the USA" despite the fact that the products were manufactured either in whole or in part in China. (Compl. PP 2-5.) Plaintiff alleges that Defendants fraudulently concealed the true facts regarding the origin of the pet foods. (Id. P 10.) Plaintiff alleges that Defendants only disclosed that components of the products came from China on or after April 17, 2007 as a result of an FDA investigation. **[*3]** (Id. P 5.) According to the complaint, each Defendant company participated in the manufacture and/or distribution of a Natural Balance brand pet food product containing a false representation that the product was "Made in the USA." (Id. P 6.)

Plaintiff alleges that Wilbur-Ellis imported from China the manufactured rice protein ingredient in Natural Balance brand pet foods. (Id. P 7.) According to the complaint, Wilbur-Ellis participated in the scheme of marketing and labeling the pet food products or was responsible for the mislabeling of the pet food products. (Id.)

Plaintiff brings his complaint as a class action, and he asserts two claims in the complaint against both Defendants. First, he brings a claim for violation of the California Consumer Legal Remedies Act ("CLRA"), *California Civil Code § 1770 et seq.* Second, Plaintiff brings a claim for unfair competition in violation of *California Business and Professions Code § 17200 et seq.* and *§ 17500 et seq.* ("UCL").

Legal Standard

Rule 12(b)(6) permits dismissal of a claim either where that claim lacks a cognizable legal theory, or where plaintiff alleges insufficient facts to support his theory. See *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990)*. **[*4]** In resolving a *Rule 12(b)(6)* motion, the court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations as true. See *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. Although a plaintiff need not give "detailed factual allegations," mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action" are not sufficient to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007)*. Instead, a plaintiff must plead sufficient facts that, if true, "raise a right to relief above the speculative level." Id.

Dismissal for failure to state a claim upon which relief can be granted is proper if a complaint is vague, conclusory, and fails to set forth any material facts in support of the allegation. See *N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 583 (9th Cir. 1983)*. Furthermore, a court may not "supply essential elements of the claim that were not initially pled." *Ivey v. Bd. of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982)*. If a court finds that a complaint fails to state a claim, the court should grant leave to amend unless **[*5]** it determines that the pleading could not possibly be cured by the allegation of other facts. See *Doe v. United States, 58 F.3d 494, 497 (9th Cir.1995)*.

As a general matter, a court may not consider any material beyond the pleadings in deciding a *Rule 12(b)(6)* motion. See *Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990)*. If the court considers matters outside of the pleadings, the court must treat the motion to dismiss as a motion for summary judgment under *Rule 56 of the Federal Rules of Civil Procedure* "and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by *Rule 56*." See *Fed. R. Civ. P. 12(b)*; see also *Hal Roach Studios, Inc., 896 F.2d at 1555 n.19*.

Analysis

Defendants argue for dismissal on several grounds. First, Defendants contend that the Court should dismiss Plaintiff's CLRA claim because he failed to provide the required notice prior to bringing suit. Second, Defendants argue that Plaintiff has not stated a claim against them under California's UCL because alleged use of foreign rice protein is insufficient to preclude labeling a product as "Made in the USA." Finally, Wilbur-Ellis **[*6]** argues that Plaintiff has not, and cannot, plead facts stating a claim under either the CLRA or UCL against it.

A. Notice Requirements Under the CLRA

The CLRA allows individual consumers to bring suit to obtain relief for specified unlawful conduct. In "an action for damages" under the CLRA, a plaintiff must provide the defendant with written notice at least thirty days prior to bringing suit. *Cal. Civil Code § 1782(a)*. The notice must specify the alleged violations, demand correction, and be sent via certified or registered mail. Id. In contrast to an action for damages, the CLRA expressly provides that "an action for injunctive relief . . . may be commenced without compliance with" the notice requirements in *§ 1782(a)*. *Cal. Civil Code § 1782(d)*. Additionally, at least thirty days following commencement of an action for injunctive relief, and after compliance with the notice requirements in *§ 1782(a)*, a plaintiff may amend the complaint without leave of court to include a request for damages. *Cal. Civil Code § 1782(d)*.

Defendants argue that, because Plaintiff seeks damages in his complaint and because he did not provide the required presuit notice, the Court must dismiss Plaintiff's **[*7]** claim under the CLRA. In opposition, Plaintiff agrees that he cannot seek damages under the CLRA at this time, states that he is not seeking damages under the CLRA, but argues that his requests for injunctive relief and restitution under the CLRA may proceed.

Plaintiff has not connected all of his various prayers for relief to particular claims, and it is unclear what remedies Plaintiff seeks under the CLRA. Nevertheless, examining Plaintiff's complaint, he states in general terms that he seeks damages, injunctive relief, and restitution. (Compl. P 2, 4.) In his opposition, however, Plaintiff notes that the prayer for damages was part of boilerplate pleading language and states that he does not seek damages under the CLRA. To the extent the complaint prays for damages under the CLRA, that claim fails for failure to give presuit notice. Courts have reached different conclusions as to whether a premature claim for damages under the CLRA requires dismissal with or without prejudice. Compare *Laster v. T-Mobile USA, Inc., 407 F. Supp. 2d 1181, 1195-96 (S.D. Cal. 2005)* (describing statutory policy of fostering early settlement of disputes and dismissing CLRA damages claim with prejudice for **[*8]** lack of presuit notice), with *Deitz v. Comcast Corp., 2006 U.S. Dist. LEXIS 94333, 2006 WL 3782902, *6-*7 (N.D. Cal. Dec. 21, 2006)* (dismissing CLRA damages claim without prejudice where complaint "alluded" to damages). Here, the complaint is unclear as to whether Plaintiff seeks damages under the CLRA. Under the circumstances of this case, the Court dismisses any damages allegation under the CLRA without prejudice.

To the extent the complaint seeks injunctive relief, that claim may proceed in light of *§ 1782(d)*. See *Kagan v. Gibraltar Say. & Loan Assoc., 35 Cal. 3d 582, 591, 200 Cal. Rptr. 38, 676 P.2d 1060 (1984)* ("This notice requirement need not be complied with in order to bring an action for injunctive relief.").

As to requests for other equitable relief, such as restitution, however, the CLRA does not specify any presuit notice requirement. In numerous cases California courts have relied on the rule of statutory construction that expression in a statute of certain things necessarily involves the exclusion of other things not expressed. See, e.g., *Mut. Life Ins. Co. v. City of Los Angeles, 50 Cal. 3d 402, 410, 267 Cal. Rptr. 589, 787 P.2d 996 (1990)* (describing this familiar rule of statutory construction encompassed by the Latin phrase *expressio unius est exclusio alterius*); **[*9]** *Gikas v. Zolin, 6 Cal. 4th 841, 852, 25 Cal. Rptr. 2d 500, 863 P.2d 745 (1993)* (noting the common rule of statutory construction and stating that court may not expand application of a statute beyond that specified by the legislature). Accordingly, this rule of construction counsels against implying a requirement for written presuit notice in suits seeking equitable relief given that the legislature only specified a notice requirement in actions seeking damages.

This appropriateness of this interpretation is strengthened by the California legislature's specific enumeration of different types of CLRA actions in *California Civil Code § 1781*, which distinguishes between actions seeking "damages," "injunctive relief," and "restitution," and the legislature's specific requirement of notice only in actions "for damages" in *§ 1782(a)*. Additionally, California courts have noted that they have "authority to order restitution as a form of ancillary relief in an injunctive action." See *Fletcher v. Sec. Pac. Nat'l Bank, 23 Cal. 3d 442, 453-54, 153 Cal. Rptr. 28, 591 P.2d 51 (1979)*. Accordingly, absent statutory language requiring presuit notice, the Court declines to imply a notice requirement to Plaintiff's claim for restitution under the CLRA.

In sum, to the extent **[*10]** Plaintiff brings a claim under the CLRA for damages, the Court **DISMISSES** that claim without prejudice. Plaintiff's claim for injunctive relief under the CLRA may proceed. Finally, absent statutory language to the contrary, the Court declines to dismiss Plaintiff's CLRA claim seeking injunctive relief and restitution for failure to give presuit notice.

B. Unfair Competition Claims Against Natural Balance

Natural Balance, joined by Wilbur-Ellis, argues that Plaintiff's complaint fails to state a claim under California's UCL arising out of false representations that pet food was "Made in the USA." According to Defendants, Plaintiff's second claim fails because the alleged foreign components of the pet food are simply foreign-sourced raw ingredients that were not made, manufactured, or produced outside the United States within the meaning of *California Business and*

Professions Code § 17533.7. In response, Plaintiff contends that Defendants improperly dispute factual allegations, and he argues that, at the motion to dismiss stage, the Court must view the allegations in the complaint in the light most favorable to Plaintiff.

California Business and Profession Code § 17533.7 provides:

> It is unlawful **[*11]** for any person, firm, corporation or association to sell or offer for sale in this State any merchandise on which merchandise or its container there appears the words "Made in U.S.A.," "Made in America," "U.S.A." or similar words when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.

According to the California appellate court, the terms "made" and "manufacture" describe the physical process of turning raw materials into goods. See *Colgan v. Leatherman Tool Group, Inc., 135 Cal. App. 4th 663, 685, 38 Cal. Rptr. 3d 36 (Ct. App. 2006)*.

Defendants contend that the rice protein identified in the complaint as coming from China is a raw ingredient that was not "made and/or manufactured" within the meaning of *§ 17533.7*. Looking at the allegations in the complaint, however, Plaintiff has sufficiently alleged this claim on this ground. The complaint sufficiently alleges that components of the pet food were "made and/or manufactured" outside of the United States. According to the complaint, one of the foreign components of the pet food was a "manufactured rice protein ingredient." (Compl. P 7.) Additionally, Plaintiff **[*12]** alleges that components of the pet foods were entirely or substantially made, manufactured, or produced outside of the United States. (Id. PP 9-10.) Although Defendants dispute the underlying facts and characterize the rice protein product as simply a "raw ingredient," the Court must construe all allegations in the light most favorable to Plaintiff Therefore, Defendants' factual disputes do not provide a ground upon which to dismiss Plaintiff's claim.

Moreover, Defendants argue in the reply that the manufactured rice protein cannot be considered an "article, unit, or part" of the finished pet food product. Without citation to legal authority, Defendants state that ingredients generally do not fit within the statutory definition. At the motion to dismiss stage, however, Plaintiff has sufficiently alleged that a part of the pet food product was manufactured outside of the United States. Additionally, although the parties dispute the applicability of Federal Trade Commission standards concerning whether a product may be labeled "Made in the USA" to interpretation of *§ 17533.7*, Plaintiff's allegations are sufficient at this stage under both *§ 17533.7* itself and the federal standards. Therefore, **[*13]** the Court need not decide whether it may consider the federal standard as a guide in interpreting the California statute. Defendants may renew their arguments at a later stage of the proceedings.

C. Sufficiency of Allegations Against Wilbur-Ellis

Plaintiff brings claims against Wilbur-Ellis under both the CLRA and the UCL based on labeling of Natural Balance pet food products as "Made in the USA." Wilbur-Ellis contends that it imported the rice protein but had no role in labeling the pet food products at issue. Further, it argues that Plaintiff's complaint relies on conclusory allegations and fails to state a claim under either the CLRA or UCL.

In support of its argument that it plays no role in the marketing and labeling of Natural Balance pet foods, Wilbur-Ellis attaches a declaration from Joey Herrick, the president of Natural Balance, in which he states that Wilbur-Ellis does not take part in marketing or labeling Natural Balance pet foods. The Court may not consider Herrick's declaration, however, without converting the motion to dismiss into one for summary judgment. See *Fed. R. Civ. P. 12(b)*. At this early stage of the proceedings, the Court declines to convert the motion to dismiss **[*14]** into one for summary judgment and, thus, does not consider the Herrick declaration.

Nevertheless, examining the allegations against Wilbur-Ellis in the complaint, Plaintiff has failed to state a claim under either the CLRA or the UCL. In particular, the complaint does not contain any factual allegations regarding how Wilbur-Ellis played a role in the marketing or labeling of the Natural Balance brand pet food as "Made in the USA." Instead, Plaintiff simply alleges in vague and conclusory terms that Wilbur-Ellis "participated in" the manufacturing and labeling of the Natural Balance pet food products. (See, e.g., Compl. P 6.) Further, the complaint states that Wilbur-Ellis was "responsible, whole or in part, for importing the manufactured rice protein ingredient in Natural Balance brand pet food products from China and supplying the same for use in the" products. (Id. P 7.) While these statements allege that Wilbur-Ellis imported and supplied the rice protein ingredient, they do not connect it to any marketing or labeling decisions. Accordingly, the allegations are insufficient to state a claim under the CLRA or UCL arising out of the labeling of the pet food products because they are **[*15]** insufficient to put Wilbur-Ellis on notice of the nature of the claims pending against it. See *Fed. R. Civ. P. 8(e)*. Plaintiff has not pleaded facts sufficient to "raise a right to relief above the speculative level" as to Wilbur-Ellis. *Bell Atlantic Corp., 127 S. Ct. at 1964*.

Moreover, Plaintiff alleges in conclusory terms that Wilbur-Ellis participated in a fraudulent scheme to misrepresent the country of origin of the pet food products. (See, e.g., id. PP 6, 7, 10.) Under *Rule 9(b) of the Federal Rules of Civil Procedure* all averments of fraud must state the circumstances constituting fraud with particularity. *Rule 9(b)*'s particularity requirement applies to state law causes of action. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003)*. Moreover, even in cases in which fraud is not an essential element of a claim, *Rule 9(b)*'s particularity requirement applies to any averments of fraud. Id. Where a plaintiff alleges a uniform course of fraudulent conduct and relies on that conduct as the basis of a claim, the claim "sounds in fraud" and the plaintiff must plead the whole claim with particularity. *Id. at 1103-04*. In contrast, in cases in which the plaintiff does not **[*16]** allege a unified course of fraudulent conduct but alleges both fraudulent and non-fraudulent conduct, *Rule 9(b)*'s heightened pleading standard applies to allegations of fraud but not to the entire claim. *Id. at 1104-05*. If a plaintiff makes averments of fraud in a claim in which fraud is not an element, the court should "disregard the averments of fraud not meeting *Rule 9(b)*'s standard and then ask whether a claim has been stated." *Id. at 1105* (emphasis omitted). The Ninth Circuit has noted that fraud is not an essential element under either the CLRA or the UCL. Id.

Here, the Court need not determine whether Plaintiff's complaint sounds in fraud such that *Rule 9(b)* applies to the entire claims, or simply contains some allegations of fraudulent conduct. To the extent Plaintiff's claims sound in fraud as to Wilbur-Ellis, he has failed to plead those claims with the particularity required by *Rule 9(b)*. He provides no details whatsoever, but simply states that Wilbur-Ellis acted fraudulently or with fraudulent intent. See *Vess, 317 F.3d at 1106* (any averments of fraud must include the who, what, when, where, and how of the alleged misconduct). Further, given that fraud is not an essential **[*17]** element of Plaintiff's claims, Plaintiff similarly fails to state a claim under either the CLRA or the UCL against Wilbur-Ellis if the Court disregards the fraud allegations not meeting *Rule 9(b)*'s requirements.

In sum, Plaintiff has failed to allege sufficiently his CLRA and UCL claims against Wilbur-Ellis. Therefore, the Court **DISMISSES** those claims as to Wilbur-Ellis. It is not clear, however, that Plaintiff could not sufficiently plead a cause of action against Wilbur-Ellis. Therefore, the Court grants the motion to dismiss on this ground without prejudice and allows Plaintiff an attempt to amend. See *Doe, 58 F.3d at 497*.

Conclusion

For the reasons discussed, the Court **GRANTS in part** and **DENIES in part** Natural Balance's motion to dismiss. The Court **DISMISSES** without prejudice any claim for damages under the CLRA. Further, the Court **GRANTS in part** and **DENIES in part** Wilbur-Ellis' motion to dismiss. The Court **DISMISSES** without prejudice Plaintiff's claims against Wilbur-Ellis. Plaintiff shall file any amended complaint no later than August 27, 2007.

IT IS SO ORDERED.

DATED: August 7, 2007

MARILYN L. HUFF, District Judge

UNITED STATES DISTRICT COURT